STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
V JOSEPH AVERY SEATON, Defendant-Appellant.	No. 293518 Wayne Circuit Court LC No. 08-017359-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of armed robbery, MCL 750.529. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 9 to 15 years in prison. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The evidence at trial showed that a Radio Shack sales clerk was showing a laptop computer to defendant. When the clerk momentarily stepped away from the counter, defendant grabbed the computer and ran out of the store. When the clerk attempted to follow defendant, defendant feigned having a weapon and threatened to shoot him. As defendant drove away from the scene, the clerk recorded the license plate number of his vehicle. At trial, the clerk identified defendant as the person who stole the laptop computer. In addition, fingerprints matching defendant's prints were found on the counter at the store, and a vehicle matching the description and license plate number reported by the store clerk was parked outside the house where defendant was arrested.

Defendant first argues that he is entitled to a new trial because defense counsel was ineffective for advising him to waive a jury trial. He contends that it was objectively unreasonable to request a bench trial where the principal issue at trial was identification and the judge who presided at trial had previously presided over an evidentiary hearing at which she suppressed the victim's identification of defendant at a pretrial lineup, but determined that there was a sufficient independent basis for the victim's identification of defendant to permit the victim's identification testimony at trial.

Because defendant did not raise this issue in a motion for a new trial or in a request for an evidentiary hearing below, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393,

423; 608 NW2d 502 (2000). "To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted). Defendant has the burden of establishing the factual predicate of his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A criminal defendant has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to waive a jury. *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). The record shows that defendant chose to waive a jury. The record also indicates that defendant discussed the matter with his attorney, but it does not indicate whether counsel recommended in favor of or against the waiver of a jury trial. Therefore, defendant has failed to establish the factual predicate for his claim. Even assuming that trial counsel recommended that defendant waive a jury trial, there is nothing in the record to indicate that counsel gave defendant inaccurate advice regarding possible advantages or disadvantages of waiving a jury, particularly with respect to the effect, if any, that the prior evidentiary hearing might have on the misidentification defense. Further, in the absence of proof to the contrary, a trial judge is presumed to follow the law, *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971), and to have predicated her verdict only upon properly admissible evidence, *People v Payne*, 37 Mich App 442, 445; 194 NW2d 906 (1971). There is nothing in the record to indicate that the trial court was influenced by or took into consideration its ruling at the prior evidentiary hearing in rejecting the misidentification defense at trial. Finally, given that defendant's fingerprints were found on the sales counter at the store and that a vehicle matching the description and license plate number reported by the store clerk was parked outside the house where defendant was found, there is no reasonable probability that a jury would have decided the identification issue any differently than the trial court did. Therefore, defendant has not shown that but for counsel's alleged error, the outcome of the trial would likely have been different.

Defendant also takes issue with trial counsel's failure to make an opening statement and failure to object to errors in the scoring of the guidelines. The decision whether to make an opening statement is a matter of trial strategy. *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). The purpose of an opening statement is to "state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Considering that the defense rested without presenting any evidence, and that defendant was tried at a bench trial and counsel was fully able to argue the misidentification defense to the court, there is no basis for finding that counsel's waiver of an opening statement was either objectively unreasonable or prejudicial. In addition, even assuming that defense counsel performed deficiently by failing to object to the scoring errors that were later identified by the prosecutor at sentencing, because the errors were corrected before defendant was sentenced, defendant was not prejudiced by counsel's error.

Defendant next argues that although his minimum sentence of nine years is within the sentencing guidelines range of 108 to 360 months, MCL 777.21(3)(c); MCL 777.62, it is unconstitutionally cruel and/or unusual. Because defendant did not argue below that a sentence

within the guidelines range would be unconstitutionally cruel and/or unusual, this issue has not been preserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Accordingly, review is limited to plain error affecting defendant's substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

The United States Constitution prohibits "cruel and unusual punishments," US Const, Am VIII, while its Michigan counterpart prohibits "cruel or unusual punishment," Const 1963, art 1, § 16. This includes a prohibition of "grossly disproportionate sentences." *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992).

In *People v Milbourn*, 435 Mich 630, 650-651; 461 NW2d 1 (1990), the Supreme Court held that a sentence must be proportionate, i.e., tailored to fit the nature of the offense and the background of the offender. The principle of proportionality is an inherent aspect of any sentence imposed under the legislative guidelines, which take into account the severity of the offense and the defendant's criminal history. *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). Thus, "a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citations omitted).

The constitutional concept of "proportionality" is distinct from the nonconstitutional "principle of proportionality" mandated for discretionary sentences under *Milbourn*. *Bullock*, 440 Mich at 34 n 17. While the purpose of the sentencing guidelines is to determine a sentence that meets the principle of proportionality, *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008), the constitutional concept "concerns whether the punishment concededly chosen or authorized by the Legislature is so grossly disproportionate as to be unconstitutionally 'cruel or unusual.'" *Bullock*, 440 Mich at 34-35 n 17. In determining whether a punishment is cruel or unusual, this Court looks at the gravity of the offense and the harshness of the penalty, compares the penalty to that imposed for other crimes in this state and to the penalty imposed for the same offense in other states, and considers the goal of rehabilitation. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). Because defendant's argument is directed toward considerations relevant to the nonconstitutional principle of proportionality enunciated in *Milbourn* rather than the constitutional concept of proportionality, and because a sentence within the legislative guidelines range is not cruel or unusual, defendant has failed to establish a plain error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens